No. 95 - 1694

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Petitioners,

v.

JOHN DOE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether an entity, which otherwise would be considered part of the State or an "arm of the State" and thereby immune from suit in federal court under the Eleventh Amendment, may lose its immunity where it has a claim for reimbursement or indemnity from the federal government or other third party.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT

The Petitioners in this case are The Regents of the University of California and John Nuckolls, a University official sued in his capacity as Director of the Lawrence Livermore National Laboratory. Petitioners were defendants in the District Court and appellees in the Court of Appeals.

John Doe, Ph.D., on behalf of himself and all others similarly situated, was the plaintiff in the District Court and the appellant in the Court of Appeals. The plaintiff's motion for class certification remains pending in District Court. *See* J.A. 39a.

In the Court of Appeals, the "Lawrence Livermore National Laboratory" was named by Respondent Doe as an appellee, but he correctly recognized in his briefs to the Court of Appeals that the Laboratory is not a legal entity but only a physical facility owned by the United States Department of Energy and managed by the University. No entity denominated the "Lawrence Livermore National Laboratory" was represented on briefs in the Court of Appeals, and the Laboratory was not otherwise a "party" to the proceeding below separate and distinct from the University and Nuckolls.

A number of federal officials were originally named as defendants in the District Court, but they were dismissed pursuant to stipulation and were not parties in the Court of Appeals. There were no other parties in the Court of Appeals.

The Regents of the University of California is a corporation authorized by Article IX, Section 9(a) of the California Constitution. It has no parent and no subsidiary companies.

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OPINIONS BELOW

The opinion of the Court of Appeals (J.A. 9a-23a) is reported at 65 F.3d 771. The memorandum opinions and orders of the United States District Court for the Northern District of California (J.A. 24a-42a) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1995. A petition for rehearing was denied on January 19, 1996. J.A. 43a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

STATEMENT OF THE CASE

A. Introduction and Summary.

This case involves a breach of contract claim brought by Respondent Doe against Petitioner, The Regents of the University of California.[1] The suit arises out of the University's activities in managing Lawrence Livermore National Laboratory, a federally-owned facility that the University operates pursuant to a contract with the United States Department of Energy ("DOE"). Doe alleges that the University breached a contract with him when it withdrew an

[1] For convenience, The Regents of the University of California generally is referred to as "the University" in this brief.

offer of employment at the Laboratory after Doe had accepted the offer. The District Court dismissed Doe's action against the University on the ground that the University is an instrumentality of the State of California, and that therefore the suit is barred by the Eleventh Amendment. The Ninth Circuit reversed. It held that the University is not entitled to be considered a State instrumentality "in this specific instance" because the agreement between the federal government and the University concerning the operation of the Laboratory obligates the federal government to indemnify the University for any liability arising out of the University's management of the Laboratory. J.A. 10a, 19a.

B. Factual Background.

Under Article IX, Section 9(a) of the California Constitution, The Regents of the University of California is a corporation with a governing board that consists of 18 members appointed by the Governor with the consent of the State Senate, and seven ex officio members including, *inter alia*, the Governor, the Lieutenant Governor, and the Speaker of the State Assembly. The University is viewed under State law as "a constitutionally created arm of the state," *Regents of the University of California v. City of Santa Monica*, 143 Cal. Rptr. 276, 279 (Cal. Ct. App. 1978), "a branch of the state itself," *Penington v. Bonelli*, 59 P.2d 448, 450 (Cal. Dist. Ct. App. 1936), "a statewide administrative agency," *Ishimatsu v. Regents of the University of California*, 72 Cal. Rptr. 756, 762 (Cal. Ct. App. 1968), and "'a branch of government equal and coordinate with the Legislature, the judiciary, and the executive,'" J.A. 16a (quoting 30 Op. Cal. Att'y Gen. 162, 166 (1957)). *See also Hamilton v. Regents of the Univ. of Calif.*, 293 U.S. 245, 257 (1934) (holding that the University "is a constitutional department or function of the state government").

The University is designated a "public trust" under Article IX, § 9(a) of the State constitution. Public support of the University "[f]rom all state revenues" is constitutionally required to be a "first" priority of the Legislature. Cal. Const. art. XVI, § 8(a). The University is authorized to exercise the power of eminent domain, Cal. Educ. Code § 92439 (West 1989), and is exempt from both local taxation, *id.* § 92443, and local regulation, *Regents of the University of California v. City of Santa Monica*, 143 Cal. Rptr. at 279-80. Under California law, "[a]ll [the University's] property is property of the state." *In re Royer's Estate*, 56 P. 461, 463 (Cal. 1899); *see also In re Bacon*, 49 Cal. Rptr. 322, 329 (Cal. Ct. App. 1966) (same); *Vaughn v. Regents of the Univ. of Calif.*, 504 F. Supp. 1349, 1354 (E.D. Cal. 1981) (same).

The Lawrence Livermore National Laboratory is a federal facility owned by the DOE.[2] The facility is managed and operated by the University pursuant to a contract with the DOE. Under the contract, the University handles all employment matters at the Laboratory, but the DOE retains control over the issuance of security clearances for Laboratory employees. J.A. 11a.

The contract provides that, subject to a number of qualifications, the DOE shall indemnify and hold the University harmless for any loss, judgment or liability "arising out of or connected with the work [under the contract]." J.A. 77a (University-DOE Contract, Art. XVII, cl. 4(b)). The contractual qualifications to DOE's obligation cover circumstances where the loss (1) is caused by "bad faith or

[2] Respondent originally named the Lawrence Livermore National Laboratory as a defendant entity in this suit but, on appeal, he correctly recognized that the Laboratory is not a legal entity but only a physical facility owned by the DOE. Appellant's C.A. Br. 5 n.2.

willful misconduct," (2) "would ultimately be an unallowable cost under the provisions of [the] contract," or (3) "results from a contractual commitment which when incurred exceed[s] the funds then obligated to the contract." *Id.* Furthermore, DOE's obligation to indemnify is expressly limited by "the availability of funds appropriated from time to time by Congress." J.A. 78a (Contract, Art. XVII, cl. 4(d)).

Respondent Doe, a citizen of New York, is a mathematical physicist who received his Ph.D. from Harvard University in 1981. He alleges that, in mid-June of 1991, he accepted an offer from the University for employment at the Lawrence Livermore National Laboratory. Doe further alleges that, shortly thereafter, the University attempted to withdraw the offer of employment on the ground that he would be unable to obtain the proper security clearance from the DOE.

C. Proceedings Below.

Doe filed this action on June 19, 1992, in the United States District Court for the Northern District of California. On February 5, 1993, the District Court issued a preliminary ruling dismissing certain of the claims against some of the defendants named in Doe's original and first amended complaints.[3]

On April 7, 1993, Doe filed a second amended complaint containing two claims. The first claim was against the University for alleged breach of an employment contract;

[3] Doe also originally named as defendants the DOE, James Watkins (then the Secretary of Energy), and Richard Claytor (then Assistant Secretary of Energy for Defense Programs). In November of 1992, Doe agreed to a stipulation by which all the federal defendants were dismissed from the case with prejudice. J.A. 25a n.4.

federal jurisdiction was premised on diversity of citizenship, 28 U.S.C. § 1332. The second claim was a claim under 42 U.S.C. § 1983 against the University and Petitioner Nuckolls for allegedly depriving Doe of his rights under federal security clearance regulations, which Doe claims were violated when allegedly "unqualified" personnel at the Laboratory "determined" his eligibility for a security clearance without regard to the procedures set forth in the regulations. *See* J.A. 12a. Jurisdiction over that claim was based on an asserted federal question, 28 U.S.C. § 1331. The two claims in Doe's second amended complaint define the current scope of the litigation.[4] Doe's complaint seeks, *inter alia,* money damages under the alleged employment contract in an amount exceeding $100,000 (the claimed amount of back pay is now much higher) and an order of specific performance requiring the University to hire Doe as a physicist according to the terms of the alleged employment contract.

On May 10, 1993, the University moved to dismiss most of the claims in Doe's second amended complaint, and the District Court granted the motion in all relevant respects on June 24, 1993. The court held that the University is an "arm of the State" for purposes of the Eleventh Amendment, and that Doe is therefore barred from pursuing the breach of contract claim in federal court. J.A. 35a-36a.

The court also dismissed the Section 1983 claim against the University and against Petitioner Nuckolls in his official capacity as Director of the Laboratory. J.A. 33a-35a. The court noted that, under *Will v. Michigan Department of State Police*, 491 U.S. 58, 70-71 (1989), governmental entities

[4] Doe's second amended complaint also requested that the District Court certify a class on behalf of all others similarly situated. The District Court did not act on the class certification request. *See* J.A. 33a.

considered "arms of the state" for Eleventh Amendment purposes, and officials of such entities (when sued in their official capacity), are not "persons" within the meaning of Section 1983, and thus are not subject to Section 1983 liability. J.A. 33a-35a. Accordingly, the Section 1983 claims against the University and Petitioner Nuckolls in his official capacity were dismissed. J.A. 36a.[5] On September 13, 1993, the District Court entered a final, appealable judgment on two of Doe's claims: (1) the breach of contract claim against the University, and (2) the Section 1983 claim against Nuckolls in his official capacity. J.A. 42a. Doe filed a timely appeal to the Ninth Circuit.

A divided panel of the Ninth Circuit reversed. The majority employed a five-factor test to determine "whether the University, acting in a managerial capacity for the Laboratory, is an arm of the state and thus entitled to Eleventh Amendment immunity from suit in federal court." J.A. 14a. The court considered:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

J.A. 15a (quoting *ITSI TV Prods. v. Agricultural Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993)).

The Ninth Circuit had previously ruled that the University was entitled to Eleventh Amendment immunity, *see Thompson*

[5] Doe's Section 1983 claim against Nuckolls in his individual capacity remains pending in the District Court. *See* J.A. 29a.

v. City of Los Angeles, 885 F.2d 1439, 1443 (9th Cir. 1989); *BV Eng'g v. Univ. of Calif., Los Angeles*, 858 F.2d 1394, 1395 (9th Cir. 1988); *cert. denied*, 489 U.S. 1090 (1989), and application of the last four of the five factors, which depend on the general structure and function of the University, was unchanged since these prior rulings. The court, however, distinguished its prior authority on the basis of the first factor. The majority ruled that application of the first factor depended on the "source of funding in each situation," J.A. 18a, and thus the University could be an arm of the State in some circumstances, but not in others, *see id.* The majority determined that the first factor weighed against recognizing Eleventh Amendment immunity because the University-DOE "[c]ontract makes clear that the [DOE], and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract." J.A. 15a

On that basis, the court held that the University, in its capacity as manager of the Laboratory, was not an arm of the State for purposes of the Eleventh Amendment. J.A. 18a. Because the University was not considered part of the State, it was subject to the court's diversity jurisdiction on Doe's contract claim. Also, for the same reason, neither it nor its officials were protected by the rule in *Will*, and, accordingly, were subject to suit under Section 1983.

Judge Canby dissented. In his view, the prior case law establishing that the University was a State instrumentality (*Thompson*, *supra*; *BV Engineering*, *supra*) should have been controlling, and the court should not "reassess the status of the University in the absence of a change in its structure." J.A. 20a.

Judge Canby recognized that the majority's decision turned on the first factor of its five-part test, *see id.*, but in his view that "factor must be viewed as a legal, not an economic

matter." *Id.* at 21a. To Judge Canby, the crucial issue was whether the State treasury is legally obligated and, he noted, "[n]o one has disputed that a judgment against the University of California is a legal obligation of the State of California." *Id.* Accordingly, Judge Canby argued that the University's contractual right to seek indemnity from the United States should be irrelevant to the analysis:

> A judgment in this case will be a legal liability of the State of California. The fact that California has a legal means of collecting an indemnity from the United States does not affect its primary liability for the judgment. Doe, if he wins his case, must execute his judgment against the State, not the United States.

Id. On that basis, Judge Canby concluded that the University should be considered part of the State for purposes of the Eleventh Amendment, and that the University's officials would therefore also be immune from Section 1983 official capacity suits under the rule in *Will*.

The University and Petitioner Nuckolls filed a petition for rehearing and a suggestion for rehearing *en banc*, both of which were denied by the Ninth Circuit on January 19, 1996. J.A. 43a-44a.

SUMMARY OF ARGUMENT

The Court of Appeals acknowledged its prior decisions holding that the University is a State entity entitled to Eleventh Amendment immunity. The Court of Appeals distinguished these decisions, and denied Eleventh Amendment immunity, solely on the basis of its determination that, "in this specific instance," a money judgment against the University most likely would be paid by the United States, pursuant to an indemnification agreement between the University and the

DOE. J.A. 18a. The Court of Appeals' decision is contrary to basic principles of Eleventh Amendment immunity.

By its terms, the Eleventh Amendment bars "*any* suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." The constitutional text does not make an exception for suits in which a private party can identify a source of funding for a money judgment other than the State itself.

This Court has recognized that the Eleventh Amendment confers immunity from suit, not merely protection against the financial impact of a money judgment. "The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U.S. 443, 505 (1887). The Court of Appeals' ruling allows a State entity such as the University to be subjected to the coercive process of federal courts, so long as the court finds that a third party is likely to bear the cost of a money judgment. The Court of Appeals' decision thus conflicts with "[t]he very object and purpose of the eleventh amendment."

The Court of Appeals erred by focusing on the economic impact of a judgment rather than the legal liability of the State. This Court has repeatedly held that the Eleventh Amendment bars *all* suits by private parties against unconsenting States and State entities, without regard to the type of relief requested by the plaintiff. A judgment against the University would be a legal obligation of the State of California. For Eleventh Amendment purposes, the economic impact of the judgment is irrelevant.

The Court of Appeals' decision is also contrary to the law governing waiver of Eleventh Amendment immunity. Because

a State's constitutional interest in immunity encompasses not only whether it may be sued, but *where* it may be sued, a State does not waive Eleventh Amendment immunity by consenting to be sued in its own courts. Once a State has consented to suit in its own courts, allowing suits to be brought in federal court should not lead to any greater financial impact on the State. Consequently, the waiver rules make little sense if Eleventh Amendment immunity is concerned only with the financial impact of litigation against the State.

In addition, the Court of Appeals' decision is in tension with decisions of this Court holding that State entities were entitled to Eleventh Amendment immunity even though a money judgment would be paid partially with federal funds. If the Court of Appeals' position were correct, this Court should have inquired further in those cases to determine the extent of Eleventh Amendment immunity.

The Court of Appeals' approach would require federal courts to engage in burdensome mini-trials in order to decide the threshold issue of Eleventh Amendment immunity. These fact-intensive proceedings, in which the court would attempt to predict the financial impact of a particular suit, would entangle the federal courts in a web of difficult ancillary issues. The court would be required to evaluate the legal merits of the State's claim against a third party, as well as practical obstacles to obtaining indemnification or reimbursement. The court would face a variety of other difficult issues, including whether a judgment would impose administrative costs on the State, and whether partial payment by a third party affects Eleventh Amendment immunity. Because the Court of Appeals' approach focuses on the financial impact of a particular judgment, a ruling in one case that a State entity is entitled to Eleventh Amendment immunity would not prevent relitigation of the Eleventh Amendment

issue in a subsequent suit against the same entity. In addition, a federal court's conclusion that a State should be reimbursed by a third party would have no *res judicata* effect on the third party, and thus could provide no certainty of indemnification.

Finally, the Court of Appeals' focus on financial impact could lead to perverse results. In this case, the DOE's indemnification obligation does not extend to acts of bad faith or willful misconduct by the University or its officials. Under the Court of Appeals' approach, a district court would be required to rule on these issues in order to decide the threshold immunity issue, and would be required to withhold immunity if it finds that the University did *not* engage in misconduct.

None of these consequences will be faced if the decision below is reversed and the University held entitled to immunity from suit in accordance with the intent and meaning of the Eleventh Amendment.

ARGUMENT

ELEVENTH AMENDMENT IMMUNITY DOES NOT DEPEND ON WHETHER A STATE ENTITY HAS A CLAIM FOR REIMBURSEMENT OR INDEMNIFICATION AGAINST A THIRD PARTY

The Court of Appeals acknowledged its prior decisions, holding that the University of California is a State entity entitled to Eleventh Amendment immunity. *See* J.A. 17a (citing *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 257 (1934); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *BV Eng'g v. Univ. of Calif., Los Angeles*, 858 F.2d 1394, 1395 (9th Cir. 1988), *cert. denied*,

489 U.S. 1090 (1989)).[6] The panel majority distinguished these precedents solely on the basis of its determination that, "in this specific instance," a money judgment against the University would most likely not have to be paid out of the State treasury, but instead would probably be paid by the federal government pursuant to an indemnification agreement with the University. *Id.* at 18a.

The panel majority's decision conflicts with decisions of other courts of appeals. For example, in *Cannon v. University*

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[6] The courts of appeals are virtually unanimous in holding that State universities are entitled to Eleventh Amendment immunity. *See Mascheroni v. Board of Regents of Univ. of Calif.*, 28 F.3d 1554, 1559 (10th Cir. 1994); *Hutsell v. Sayre*, 5 F.3d 996, 999 (6th Cir. 1993) (University of Kentucky); *Lassiter v. Alabama A & M Univ., Bd. of Trustees*, 3 F.3d 1482, 1485 (11th Cir. 1993); *Kaimowitz v. Board of Trustees, Univ. of Illinois*, 951 F.2d 765, 767 (7th Cir. 1991); *Dube v. State Univ. of New York*, 900 F.2d 587, 594 (2d Cir. 1990); *Richard Anderson Photography v. Brown*, 852 F.2d 114, 116 (4th Cir. 1988) (Radford University); *Estate of Ritter by Ritter v. University of Mich.*, 851 F.2d 846, 851 (6th Cir. 1988); *Hall v. Medical Coll. of Ohio at Toledo*, 742 F.2d 299, 307 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *United Carolina Bank v. Board of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 558 (5th Cir. Unit A 1982); *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1350 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983); *Jagnandan v. Giles*, 538 F.2d 1166, 1176 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977) (Mississippi State University); *Prebble v. Brodrick*, 535 F.2d 605, 610 (10th Cir. 1976) (University of Wyoming); *Long v. Richardson*, 525 F.2d 74, 76 (6th Cir. 1975) (Memphis State University); *Soni v. Board of Trustees of the Univ. of Tenn.*, 513 F.2d 347, 352 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); *Brennan v. University of Kansas*, 451 F.2d 1287, 1290-91 (10th Cir. 1971). *Walstad v. University of Minnesota Hosps.*, 442 F.2d 634, 641-42 (8th Cir. 1971). In the only court of appeals decision holding a State university not to be generally a part of the State, the court based its decision on the history of Rutgers University as a private institution and the degree of structural independence that the university retained. *See Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303, 1312 (3d Cir. 1987).

of Health Sciences, 710 F.2d 351 (7th Cir. 1983), the Seventh Circuit held that Southern Illinois University and the Board of Trustees of the University of Illinois were entitled to Eleventh Amendment immunity because both universities are "recognized as state agencies under Illinois law." *Id.* at 356. The court rejected the argument that its Eleventh Amendment analysis should be "altered by the possibility that a damage award would be met through insurance proceeds or from federal funds." *Id.* at 357. Rather, the court held that the universities were entitled to Eleventh Amendment immunity because any judgment in the case would be "chargeable to university assets." *Id.*. Similarly, the Fifth Circuit in *Cronen v. Texas Department of Human Services*, 977 F.2d 934, 938 (5th Cir. 1992), rejected the argument that a State or State agency could be sued if the federal government would ultimately bear the entire cost of the judgment. Following the principles set forth in this Court's Eleventh Amendment decisions, the court concluded that "the source of the damages is irrelevant when the suit is against the state itself or a state agency." *Id.*[7]

The analysis of the courts in *Cannon* and *Cronen* is correct: Eleventh Amendment immunity that otherwise would be available to a State or State entity should not be compromised merely because the entity has taken steps to

[7] Other circuits have followed the approach of the panel majority, and based Eleventh Amendment immunity on a prediction of the likely financial impact of a particular judgment against a State entity. *See, e.g., Brown v. Porcher*, 660 F.2d 1001, 1007 (4th Cir.), *cert. denied*, 459 U.S. 1150 (1981) (allowing suit against State entity based on a determination that the entity could recoup sums attributable to damage awards); *Bennett v. White*, 865 F.2d 1395, 1408 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989) (allowing recovery to the extent that the State will receive reimbursement for a damages award). The split among the circuits is discussed at greater length in the University's petition for certiorari. *See* Pet. 9-21.

protect itself from the financial consequences of a money judgment. Regardless of whether the State entity may be entitled to indemnification for the costs of a judgment, the coercive process of the federal courts still runs against the State entity. That basic fact implicates the Eleventh Amendment, for, as this Court stated in *In re Ayers*, 123 U.S. 443, 505 (1887), "[t]he very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties."[8]

A. The Eleventh Amendment Confers Immunity From Suit, Not Merely Protection Against The Financial Impact Of A Money Judgment.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

[8] The question presented in this case would arise even if Eleventh Amendment immunity were limited to diversity cases. *Cf. Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 148 (1993) (Blackmun, J., concurring) (adhering to his view that the Eleventh Amendment preserves a State's immunity from suit only "in the limited context of an action by a citizen of another State or of a foreign country on a state-law cause of action," but nevertheless concluding that "a claim of immunity under the Eleventh Amendment should be appealable immediately"). Respondent Doe, who is a citizen of New York, has invoked the federal courts' diversity jurisdiction and asserted a state-law claim for breach of contract against the University. *See* J.A. 46a, 50a.

By its terms, the Amendment provides that the States are not subject to suit in federal court by citizens of another State. The language of the Eleventh Amendment does not provide that a citizen of another State may sue a State in federal court so long as a third party will bear the ultimate financial consequences of a money judgment. To the contrary, the Eleventh Amendment expressly bars "*any* suit in law or equity" against the States. (Emphasis added.) As this Court recognized in *Cory v. White*, 457 U.S. 85, 90-91 (1982):

> It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself merely because no money judgment is sought. . . . [T]he Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself.

The panel majority held, without textual support in the Amendment, that an arm of the State such as the University can be sued in federal court whenever the court can identify a "source of funding" for a money judgment other than the State treasury. J.A. 18a. Yet, when an arm of the State is sued, the action is "against one of the United States," no matter what source of funding may ultimately satisfy a judgment, and thus the Eleventh Amendment immunity applies.

This conclusion is confirmed by this Court's Eleventh Amendment decisions, which have recognized for more than a century that the Eleventh Amendment confirms a "presupposition" of our constitutional structure. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1122 (1996), quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775,

779 (1991). *See also Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 472 (1987) (plurality opinion); *Pennhurst Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *Hans v. Louisiana*, 134 U.S. 1 (1890). "That presupposition . . . has two parts: first, that each State is a sovereign entity in our federal system; and second, that '"[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."'" *Seminole Tribe*, 116 S. Ct. at 1122, quoting *Hans*, 134 U.S. at 13, quoting, in turn, *The Federalist* No. 81 at 487 (C. Rossiter ed. 1961) (A. Hamilton).[9] Accordingly, the Court has repeatedly held "that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe*, 116 S. Ct. at 1122 & n.7, quoting *Hans*, 134 U.S. at 15 and collecting cases.

It follows that the Eleventh Amendment confers on the States a true immunity from suit in federal court, not merely protection from the financial effects of money judgments. The Court recognized this principle in *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.* ("*PRASA*"), 506 U.S. 139 (1993), which held that a district court order denying a claim by a State entity to Eleventh Amendment immunity is immediately appealable under the collateral order doctrine of

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[9] Hamilton wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity . . . it will remain with the States.

The Federalist No. 81 at 487-88 (C. Rossiter ed. 1961) (A. Hamilton).

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). The Court concluded in *PRASA* that the "same rationale" that supports an immediate appeal from denials of an official's claim of absolute or qualified immunity applies to claims of Eleventh Amendment immunity: "'The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" 506 U.S. at 144, quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

The Court's opinion in *PRASA* noted that the Eleventh Amendment, by withdrawing jurisdiction from federal courts to decide suits brought against unconsenting States, "effectively confers an immunity from suit." *Id.* (citing cases). The Court concluded that, "[o]nce it is established that a State and its 'arms' are, in effect, immune from suit in federal court, it follows that the elements of the *Cohen* collateral order doctrine are satisfied." *Id.* In particular, "the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice." *Id.*

The Court's decision in *PRASA* expressly rejected the contention that "the Eleventh Amendment does not confer immunity from suit, but merely a defense to liability." *Id.* The Court explained that a narrow view of the Eleventh Amendment, as conferring only a defense to liability, "misunderstands the role of the Amendment in our system of federalism: '[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Id.* at 146, quoting *In re Ayers*, 123 U.S. at 505. Thus, while an immediate appeal from the denial of an Eleventh Amendment immunity claim "is justified in part by

a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated." 506 U.S. at 146.[10]

The Court reaffirmed the importance of the States' dignitary interests last Term in *Seminole Tribe*, where it rested its decision on the principle that the Eleventh Amendment "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" 116 S. Ct. at 1124, quoting *PRASA*, 506 U.S. at 146.

The importance of the States' dignitary interests is confirmed by the Court's analysis in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994), which considered the applicability of the Eleventh Amendment to a bistate agency established under the Compact Clause. The Court began its analysis in *Hess* by considering the States' dignitary interests and the accompanying concerns of federalism. The Court first satisfied itself that "[b]istate entities occupy a significantly different position in our federal system than do the States themselves," 115 S. Ct. at 400, and that a "[s]uit in federal court is [neither] an affront to the dignity of a Compact Clause entity" nor a threat to "the integrity of the compacting States," *id.* at 401. *See also id.* at 404 (determining, as first step of analysis, that it is not "disrespectful to one State to call upon the Compact Clause

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[10] If the Court of Appeals' approach to Eleventh Amendment immunity were correct, it is difficult to see why denial of a claim of Eleventh Amendment immunity should be immediately appealable. Under the Court of Appeals' view, the fact that a State or State entity is required to undergo a trial should not matter, so long as the State is not ultimately required to pay a money judgment.

entity to answer complaints in federal court").[11] Only after concluding that Compact Clause entities are significantly different from States for Eleventh Amendment purposes did the Court proceed to consider "the vulnerability of the State's purse," *id.*, as a factor in determining whether the Compact Clause entity was entitled to Eleventh Amendment immunity.

The Court of Appeals' decision disregards the States' dignitary interests. The panel majority held, in effect, that an unconsenting State entity such as the University of California may be sued in federal court whenever a private plaintiff can establish that the State entity will not have to bear the cost of a money judgment. Under the Court of Appeals' ruling, the Eleventh Amendment does not protect a State entity from the indignity of being subjected to the coercive process of a judicial tribunal at the instance of a private party, including the obligation to respond to the complaint, provide discovery, defend at trial, and comply with the federal court's judgment. Under the Court's analysis, the State entity is subject to such suits even on state law claims. The panel majority's decision thus is incompatible with the basic principle that the Eleventh Amendment provides States and State entities with immunity from suit.

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[11] As the Court recognized in *Hess*, 115 S. Ct. at 401-02, and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400 (1979), Compact Clause entities — which are formed by two or more States and not accountable to the people of any one State — do not fit comfortably within the text of the Eleventh Amendment, which prohibits suits in federal court "against one of the United States." That textual consideration clearly supports immunity in this case, because the University was created as a branch of the State government by the California Constitution, and is accountable solely to the people of that State.

B. Eleventh Amendment Immunity Turns On Whether A State Entity Is Being Subjected To The Coercive Process Of The Federal Courts, Not On Whether A Monetary Award Will Have A Financial Impact On The State.

As Judge Canby noted in dissent, "[n]o one has disputed that "a judgment against the University of California is a legal obligation of the State of California." J.A. 21a. Accordingly, "[a] judgment in this case will be a legal liability of the State." *Id.* As Judge Canby explained,

> The fact that California has a legal means of collecting an indemnity from the United States does not affect its liability for the judgment. Doe, if he wins his case, must execute his judgment against the State, not the United States.

Id. Moreover, Doe is seeking, in addition to back pay, an order requiring the University to employ him. J.A. 52a. Such an order would have to be carried out by the University itself even if the federal government paid an award of damages.

The Court of Appeals did not take issue with Judge Canby's conclusion that the State will be legally liable for any judgment entered against it. Instead, it concluded that the relevant inquiry for Eleventh Amendment purposes is whether the judgment will have a sufficient economic impact on the State. *See* J.A. 18a ("the source of funding in each situation . . . must be examined closely"). This approach is contrary to the principle that the Eleventh Amendment bars private parties from bringing *any* suit against unconsenting State entities in federal court, no matter what form of relief the plaintiff seeks.

The Court has repeatedly recognized this principle. In *Cory v. White*, as noted above (*supra* p. 16), the Court expressly rejected the view that the Eleventh Amendment immunity applies only to "suits 'by private parties seeking to impose a liability which must be paid from public funds in the state treasury.'" 457 U.S. at 90, quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). In *Pennhurst*, 465 U.S. at 100, the Court stated that, "in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment . . . regardless of the nature of the relief sought." Most recently, in *Seminole Tribe*, the Court stated: "[W]e have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." 116 S. Ct. at 1124, citing *Cory v. White*, 457 U.S. at 90.

The Court's decisions concerning the scope of Eleventh Amendment immunity are consistent with "'[t]he general rule . . . that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, *or* interfere with the public administration," *or* if the effect of the judgment would be "to restrain the Government from acting, *or* to compel it to act."'" *Pennhurst*, 465 U.S. at 101 n.11, quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (emphasis added; citations omitted). *See also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Brown v. General Services Admin.*, 425 U.S. 820, 826-27 (1963). In this case, Doe seeks an order compelling the University to employ him, as well as a money judgment. *See* J.A. 52a.

It is true that suits against State *officials* can be brought in federal court under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), so long as they seek prospective relief for violations of federal law. *See Edelman*, 415 U.S. at 664;

Pennhurst, 465 U.S. at 106. But as the Court explained in *PRASA*, the *Ex parte Young* exception to Eleventh Amendment immunity "has no application in suits against the States and their agencies, which are barred regardless of the relief sought." 506 U.S. at 146, citing *Cory v. White*, 457 U.S. 85. The Court explained:

> Rather than defining the nature of Eleventh Amendment immunity, *Young* and its progeny render the Amendment wholly inapplicable to a certain class of suits. Such suits are deemed to be against officials and not the States or their agencies, which retain their immunity against all suits in federal court.

506 U.S. at 146.

Even under the *Ex parte Young* exception, moreover, the financial impact of a suit on the State treasury is not necessarily determinative. The distinction between prospective and retrospective relief recognized in *Edelman* rests on the view that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Pennhurst*, 465 U.S. at 102). As the Court observed in *Edelman*, "fiscal consequences to state treasuries" may be "the necessary result of compliance with decrees which by their terms [are] prospective in nature"; even "[t]he injunction issued in *Ex parte Young* was not totally without effect on the State's revenues," and later decisions have authorized relief that probably had an even "greater impact on state treasuries." 415 U.S. at 667, 668. *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1971) (holding that the Eleventh Amendment did not bar a federal court from ordering Arizona and Pennsylvania officials to grant welfare benefits to otherwise qualified applicants who were aliens, even though injunction

would require expenditure of large sums of money from the States' treasuries); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (rejecting an Eleventh Amendment challenge to a school desegregation order that required Michigan to expend substantial amounts of money from the State treasury to implement aspects of a school desegregation plan).[12]

The foregoing shows that financial impact on the State has not been the sole touchstone of Eleventh Amendment immunity, and thus the Court of Appeals got the wrong answer because it asked the wrong question. For Eleventh Amendment purposes, the relevant question is not whether the State or a State entity will ultimately bear the cost of a money judgment. Rather, the relevant question is whether the coercive process of the federal courts will operate against the State.

C. Making Eleventh Amendment Immunity Turn On The Financial Impact Of A Money Judgment Is Inconsistent With The Law Governing Waiver Of Immunity By The State.

The Court of Appeals' decision is also contrary to the law governing waiver of Eleventh Amendment immunity. This Court has long held that a State may waive its Eleventh Amendment immunity by consenting to be sued in federal court. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883).

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[12] Lower courts have held that a State's decision to indemnify its officers does not prevent a plaintiff from suing the officer in federal court under the doctrine of *Ex parte Young*. *See* J.A. 22a (citing *Blaylock v. Schwinden*, 862 F.2d 1352, 1353-54 (9th Cir. 1988); *Demery v. Kupperman*, 735 F.2d 1139, 1147-48 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985)). As Judge Canby recognized, this is a further indication that "[t]he question is not who pays in the end; it is who is legally obligated to pay the judgment that is being sought." *Id.* at 22a.

Because "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights," a federal court will find a waiver of Eleventh Amendment immunity "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Edelman*, 415 U.S. at 673, quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). In particular, "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst*, 465 U.S. at 99 (emphasis in original). Accordingly, a State does not waive Eleventh Amendment immunity merely by consenting to be sued in its own courts. *Id.* at 99 n.9.

The distinction between a State's waiver of sovereign immunity from suit in its own courts and a waiver of Eleventh Amendment immunity from suit in federal courts makes little sense if Eleventh Amendment immunity is concerned only with the financial impact of litigation against the State. Once a State has consented to suit in its own courts, suit in federal court should not lead to any greater financial impact on the State's treasury, given that the same substantive law is applied in both fora.

The rules concerning waiver of Eleventh Amendment immunity make sense because the Eleventh Amendment encompasses a *jurisdictional* rule that protects the State's dignitary interests in being held accountable only in courts of its own creation. *See Seminole Tribe of Florida*, 116 S. Ct. at 1127; *Pennhurst*, 465 U.S. at 116-17 (Eleventh Amendment doctrine is grounded in the "problems of federalism inherent in making one sovereign appear against its will in the courts of the other"). Thus, Eleventh Amendment waiver principles reinforce the conclusion that the Court of Appeals' approach is incorrect.

D. The Court Of Appeals' Decision Is In Tension With Decisions of This Court Holding That State Entities Are Entitled To Eleventh Amendment Immunity Even Though Federal Funds Would Satisfy Part Of The Judgment.

The Court of Appeals' decision is also in tension with decisions of this Court holding that State entities were entitled to Eleventh Amendment immunity even though a money judgment would be paid partially with federal funds. In *Edelman*, the plaintiffs challenged Illinois officials' administration of the federal Aid to the Aged, Blind, and Disabled (AABD) program. In its statement of facts, the Court recognized that the AABD program was funded in part by the federal government. 415 U.S. at 653. In rejecting an argument that Illinois had constructively consented to suit in federal court by agreeing to administer federal funds in compliance with federal law, the Court said:

> The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts.

Id. at 673. If the Court of Appeals' approach to Eleventh Amendment immunity were correct, this Court in *Edelman* should have inquired further to determine whether a judgment would be paid wholly or partly out of federal funds. *Cf. Bennett v. White*, 865 F.2d 1395, 1408 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989) (ordering an accounting so that the District Court could impose retroactive relief against the State Department of Public Welfare "at least to the extent that DPW will be reimbursed by the United States"); *Robinson v. Block*, 869 F.2d 202, 214 n.11 (3d Cir. 1989) (same).

This Court followed its *Edelman* line of analysis in *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981) (per curiam). There the Court rejected an argument that Florida's agreement to comply with federal law in its administration of federal Medicaid benefits to nursing homes constituted a waiver of Eleventh Amendment immunity. *Id.* at 148-49. As in *Edelman*, the Court found that there was no waiver, and held that the Eleventh Amendment barred suit even though the federal government would pay a substantial portion of any judgment.

In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the plaintiff sought retroactive relief in the form of payments under the Rehabilitation Act of 1973 from a State hospital that was the recipient of federal grants. Again, the Court held that "the mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Id.* at 246-47. Again, the Court did not find it relevant to inquire whether any judgment would be paid out of federal funds.

Although these cases involved partial rather than full federal funding, some courts of appeals have correctly recognized that even 100 per cent federal funding of benefits (as in the Food Stamp program) does not affect Eleventh Amendment immunity. *See, e.g., Cronen v. Texas Dept. of Human Servs.*, 977 F.2d 934, 938 (5th Cir. 1992) ("source of the damages is irrelevant when the suit is against the state itself or a state agency"); *Cotton v. Mansour*, 863 F.2d 1241, 1245-46 (6th Cir. 1988) (rejecting, as "inconsistent with Supreme Court precedent," district court's holding that "if the [food] stamps themselves were paid by the federal

government, the state could not claim eleventh amendment protection").[13]

E. Federal Courts Should Not Engage In Extensive Case-By-Case Inquiries Into A State Entity's Finances To Decide Claims Of Eleventh Amendment Immunity.

The position advocated by Judge Canby in dissent, and adopted by other courts of appeals, *see, e.g., Cannon v. University of Health Sciences*, 710 F.2d 351, 356-57 (7th Cir. 1983); *Cronen v. Texas Dept. of Human Services*, 977 F.2d 934, 938 (5th Cir. 1992), allows the Eleventh Amendment to function as a true immunity from suit: If a State entity is sued in federal court, it can file a motion to dismiss, and the court can evaluate the claim of immunity as a matter of law. If the entity has previously been determined, under controlling circuit authority, to be part of the State, the case is dismissed. If that determination has not yet been made, the court will evaluate whether the entity is part of the State government. That determination, however, will not be specific to the facts of any one case and, once made, should be binding in future

[13] This Court's decisions concerning State taxation of contractors that conduct business with the federal government are relevant by analogy. In *United States v. New Mexico*, 455 U.S. 720 (1982), the Court held that private contractors managing nuclear design laboratories owned by the federal government are independent taxable entities not subject to the federal government's immunity from State taxation. The Court drew a sharp distinction between the federal government and its contractors, concluding that "immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." Id. at 734. *See also United States v. California*, 507 U.S. 746 (1993); *United States v. Boyd*, 378 U.S. 39 (1964). The federal government's obligation to indemnify its contractors neither expands federal immunity from taxation nor contracts Eleventh Amendment immunity.

cases unless there is a change in the entity's basic position within the State government. *See* J.A. 20a-21a (Canby, J., dissenting) ("Once we have decided that the University is an arm of the Government of California for Eleventh Amendment purposes, the role that these structural factors play [in determining immunity] should be put to rest.").

In contrast, the rule adopted by the majority below — that a State entity may lose its Eleventh Amendment immunity in a particular case depending on a prediction about the ultimate financial impact of the suit — provides no true immunity from suit. A plaintiff will frequently (perhaps always) be able to sue a State entity in federal court and demand burdensome discovery directed to the entity's sources of funding and the likely financial impact of a judgment. To maintain its Eleventh Amendment immunity, a State entity will be required to undergo a fact-intensive mini-trial in which the district court will attempt to predict the ultimate financial impact of the suit. All State entities will be subject to this sort of mini-trial, even entities (such as the University) that courts previously have held to be a part of the State for Eleventh Amendment purposes. The State entity often will be required to disclose detailed information about its internal finances and financial arrangements with third parties before the court can rule on an Eleventh Amendment immunity claim.

The difficulties with this case-specific approach were recognized by Judge Canby in his dissenting opinion below. He warned that the majority's decision raises the specter of "a judicial exercise that has no natural boundary." J.A. 22a (Canby, J., dissenting). As Judge Canby observed:

> In deciding the threshold question of Eleventh Amendment immunity, we can determine from the pleadings before us and the state statutes whether the judgment that is sought would run against the State. It is

> far more difficult to determine whether the State, after such a judgment was rendered against it, would have rights of action against third parties that might lead it eventually to recoup the judgment. In this case, there is a relatively clear indemnity agreement, but does the United States have any defenses to a claim of indemnity? In the next case the State might not have the benefit of an indemnity agreement, but might have a common-law cause of action against a third party. Must we assess the State's likelihood of success in order to decide the Eleventh Amendment question?

Id. Judge Canby's dissent aptly summarizes a range of possible complications bound to arise in pretrial proceedings that attempt to determine the ultimate financial impact of a particular suit. If State entities can always be subjected to such proceedings, they have no real immunity from suit in federal court.

Other courts of appeals have recognized the practical difficulties that would be created by tying Eleventh Amendment immunity to a prediction of the ultimate financial impact of the judgment. In *Paschal v. Jackson*, 936 F.2d 940 (7th Cir. 1991), for example, the Seventh Circuit refused to inquire into the ultimate source of funds used by a State entity to satisfy a judgment because, among other reasons, it would require courts "to engage in a detailed audit of the defendant's finances to determine whether the defendant department or subdivision is indeed 'the state.'" *Id.* In *Doucette v. Ives*, 947 F.2d 21, 29 (1st Cir. 1991), the First Circuit also noted that, in circuits where a reimbursement exception to Eleventh Amendment has been recognized, district courts are required to conduct "a fact-specific inquiry" concerning the impact of judgment. Such factual inquires are inconsistent with the basic purpose of the Eleventh Amendment, which is to provide a threshold immunity from suit. *See PRASA*, 506

U.S. at 147 (adjudication of Eleventh Amendment immunity should not "implicate[] any extraordinary factual difficulty").

As Judge Canby's dissent suggests, even after a federal court engages in an intrusive inquiry into the entity's finances, it may be far from certain whether a particular judgment will have an impact on the State treasury. The court often would be required to weigh the legal merits of the State's claim against a third party, including potential defenses available to the third party. In this case, for example, even through the University has entered into a "relatively clear" indemnity agreement, (J.A. 22a), the DOE's contractual obligation to indemnify the University is limited by several express qualifications, the scope of which may be disputed by the government, and the obligation is also subject to "the availability of funds appropriated from time to time by Congress." J.A. 78a (Contract, Art. XVII, cl. 4(d)). In many cases, the district court would also be required to consider whether a legally valid claim against a third party might not be paid (because, for example, the third party may become insolvent).

Even if it appears that the State has a valid claim against a third party and the third party is likely to pay the judgment, it may be difficult to determine whether the judgment will nevertheless have a financial impact on the State. For example, even if the federal government or another third party pays 100 percent of the face amount of the judgment, the judgment may impose administrative costs on the State. *Compare Cotton v. Mansour*, 863 F.2d at 1245-47 (holding that the Eleventh Amendment prohibited retroactive relief even though the federal government would pay 100 per cent of the judgment, because the State would bear some administrative costs) and *Colbeth v. Wilson*, 554 F. Supp. 539, 544-46 (D. Vt. 1982) (same), *aff'd*, 707 F.2d 57 (2d Cir. 1983) (*per curiam*) *with Foggs v. Block*, 722 F.2d 933, 941 n.6 (1st Cir.

1983) (holding that administrative costs are irrelevant to Eleventh Amendment analysis because they "should be de minimis"), *rev'd on other grounds sub nom. Atkins v. Parker*, 472 U.S. 115 (1985).

In addition, the timing of payment may impose a cost on the State. If there are delays in obtaining payment from a third party, the State may be required to pay the judgment with funds from its treasury, and may be unable to recoup interest on the money it pays out. *See Doucette*, 947 F.2d at 29.[14]

An additional layer of complexity arises in cases in which a third party is likely to pay some, but not all, of a judgment. In such cases, the logic of the Ninth Circuit's approach might require federal courts to adopt a "pro rata" approach to Eleventh Amendment immunity, based on the court's prediction of the percentage of the judgment that would be paid by the third party. *See Bennett v. White*, 865 F.2d at 1408 (ordering an accounting so that the district court could impose retroactive relief against the State Department of Public Welfare "at least to the extent that DPW will be reimbursed by the United States"); *Robinson v. Block*, 869 F.2d at 214 n.11 (3d Cir. 1989) (same). *Compare Fernandez v. Chardon*, 681 F.2d 42, 59-60 (1st Cir. 1982), *aff'd on other grounds sub nom. Chardon v. Fumero Soto*, 462 U.S. 650 (1983) (declining to create an exception to Eleventh Amendment immunity where federal and State funds are "intermingled").

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[14] Judgments may impose other costs on the State. For example, if a third party is required to indemnify the State pursuant to a contractual agreement, the expected cost of such awards is likely to be a factor in future contract negotiations between the State and the third party.

The difficulties federal courts inevitably would encounter in predicting the financial impact of particular judgments are illustrated by the court of appeals' treatment of cases in which a judgment against a State entity would be covered by an insurance policy. Several courts of appeals have concluded that State entities would be required to pay higher insurance premiums if they were subjected to a suit for damages in federal court, and therefore have held that the insured status of a State entity does not destroy Eleventh Amendment immunity. *See, e.g., In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F.2d 940, 945 (1st Cir. 1989) (Tourism Company of Puerto Rico entitled to Eleventh Amendment immunity even though "any judgment against the Tourism Company would be paid by its insurance carriers"); *Markowitz v. United States*, 650 F.2d 205, 206 (9th Cir. 1981) (State entitled to Eleventh Amendment immunity even if it has liability insurance that will pay the judgment). Although the prediction of higher insurance premiums may hold true in some cases, in other cases the effect is not as clear. If the State has waived sovereign immunity, the State entity will be subject to suit in State court even if the Eleventh Amendment bars a suit in federal court. *See Dupont Plaza Hotel*, 888 F.2d at 944-45 (State subject to suit in State court under "sue and be sued" provision of its statutory charter). *See generally Florida Nursing Home Ass'n*, 450 U.S. at 149-50 ("sue and be sued" clause authorizes suits in State, but not federal, courts). State entities may purchase third-party liability insurance precisely *because* the State has waived sovereign immunity from suit in its own courts. Thus, under the panel majority's approach, an inquiry would be required as to the possible effects on future premiums of federal court judgments against State entities.

In short, requiring federal courts to make fact-intensive determinations concerning sources of funding for judgments against States could quickly entangle them in a web of difficult

ancillary issues. Not only would this burden the federal courts, but it would also impose the prospect of unending litigation for State entities. The Court of Appeals' test requires examination of whether the State entity is entitled to Eleventh Amendment immunity in each "specific instance." J.A. 18a. Given the ingenuity of lawyers in arguing that one specific instance differs from another, a ruling in one case that an entity is an arm of the State would rarely prevent relitigation of that issue in subsequent cases.

One of the exceptions in the University-DOE contract illustrates the perverse implications of the Court of Appeals' ruling. Under Article XVII, cl. 4(b), the DOE's indemnity obligation does not extend to circumstances where the University or its officials are guilty of "bad faith or willful misconduct." J.A. 77a; *see also* J.A. 82a (DOE will bear the cost of any judgment "absent clear and convincing evidence of bad faith or willful misconduct"). Although the University would certainly deny that there has been any bad faith or willful misconduct on its part in this case, it makes no sense for a trial court to determine in advance whether such misconduct occurred in order to rule on the University's threshold claim to immunity. In addition, it is perverse to withhold immunity *because* the University did not engage in misconduct. That, however, is the effect of the Court of Appeals' holding. For, if this were a case involving willful misconduct, the University would be liable for the costs of the judgment and, under the reasoning of the Court of Appeals, the Eleventh Amendment would apply.

A final procedural objection to the majority ruling below is presented by the limitations of *res judicata*: While a court may hold in the primary liability case that the State *should* be reimbursed by the federal government (or a private insurer), that ruling provides no guarantee to the State entity that it *will* be reimbursed. The court's ruling is clearly not binding on

the federal government or on any other third party not represented in the case. Thus, the court's ruling would amount to no more than a prediction of the likely financial impact of the judgment that could provide no certainty for the State.

CONCLUSION

A State or State entity does not forfeit Eleventh Amendment immunity merely because it has a claim for indemnification or reimbursement against the federal government or another third party. The Court of Appeals' decision is contrary to the text of the Eleventh Amendment and is fundamentally incompatible with this Court's Eleventh Amendment decisions, which have recognized that the Amendment confers an immunity from suit that does not depend on whether the plaintiff is seeking a money judgment. The Court of Appeals' approach would require federal courts to undertake a burdensome case-by-case inquiry into the finances of State entities in order to decide threshold claims of Eleventh Amendment immunity.

Because the University's indemnification agreement does not compromise its Eleventh Amendment immunity, Respondent's claims against the University must be dismissed. In addition, because suits against State officials in their official capacity are not suits against "persons" for purposes of § 1983, all claims against Petitioner Nuckolls in his official capacity seeking retrospective relief must be dismissed. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989).[15]

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[15] The Court of Appeals' ruling that the Section 1983 claim against Petitioner Nuckolls could go forward was based entirely on its conclusion (J.A. 19a) that the University is not protected by Eleventh Amendment

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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immunity "in this particular instance." Accordingly, if the Court holds that the University is entitled to Eleventh Amendment protection, the Court of Appeals' ruling on the Section 1983 claim against Nuckolls must also be reversed. Doe's Section 1983 claim against Nuckolls is not based on an allegation of an ongoing violation of federal law, and thus is barred under *Edelman* and *Papasan* v. *Allain*, 478 U.S. 265, 279 (1986).